

Owen (Migration) [2021] AATA 149 (14 January 2021)

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- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr James Michael Owen Mrs Lorna Elizabeth Owen Mr Freddie James Owen Miss Franki Elizabeth Owen
CASE NUMBER:	1802720
DIBP REFERENCE(S):	BCC2016/1897902
MEMBER:	Andrew George
DATE:	14 January 2021
PLACE OF DECISION:	Darwin
DECISION:	The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 187 - Regional Sponsored Migration Scheme visas: • Public Interest Criterion 4020 for the purposes of cl.187.213 of Schedule 2 to the Regulations. •

Statement made on 14 January 2021 at 4:16pm

CATCHWORDS

MIGRATION – Regional Employer Nomination (Permanent) (Class RN) visa – Subclass 187 (Regional Sponsored Migration Scheme) – Civil Engineer – false or misleading information – claimed work experience – hearsay material displaced by direct evidence – element of fraud or deception – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 187.213; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 17 January 2018 to refuse to grant the applicants Regional Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 31 May 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.187.213 of Schedule 2 to the *Migration Regulations 1994* (the Regulations). The delegate found:¹
 6. *The information before the department indicates that you did not work for Traffic Direct Limited in the position of Civil Engineer from 6 August 2010 to 29 November 2013, I have therefore drawn a conclusion that you have provided false and misleading declaration with regards to your work experience.*
 7. *Furthermore, the information before the Department indicates that you have provided two reference letters that do not support your claimed work experience. As a consequence I have drawn a conclusion that you have provided two false and misleading reference letters to support your claimed work experience.*
 8. *As a consequence of this, I have concluded that you have attempted to mislead the department in relation to the assessment of the above regulation and the skill requirements listed in ANZSCO which prescribe that work experience can be considered as a substitute for a formal qualification of your nominated occupation Building Associate.*
9. The applicants were represented by Mr Kavanagh of ASC Migration. This matter was listed on 24 September 2020 and then 15 October 2020, with both occasions being postponed at the applicant's request. A subsequent hearing on 29 October 2020 was cancelled due to the unavailability of the Member. Nevertheless, in accordance with the practice directions Mr Kavanagh had helpfully submitted a detailed bundle of all relevant documents that included submissions and witness statements (the 'Hearing Book'). Given the favourable material now before the Tribunal, a hearing is not required: s.360(2)(a).
10. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.187.213 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and

¹ Delegate's decision/6.

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

12. PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

13. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
14. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether the document or information was provided by the applicant knowingly or unwittingly.
15. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
16. The Tribunal notes that there are no copies of any notes, statements, or records of conversation made by any departmental officers during their inquiries. The delegate has heavily relied on material from departmental officers regarding conversations those officers have had with relevant persons, such as a Mr Stuart Willmott. This material is not before the Tribunal. Although the Tribunal does not necessarily regard the delegate's summary of evidence to be inaccurate, this hearsay material is not to be preferred where it is displaced by direct evidence. The Tribunal notes that the applicant has provided such direct evidence in the form of his witness statement.²
17. The applicant's evidence is that he made a mistake about the employment dates at his former employer Traffic Direct,³ and that he subsequently corrected these.⁴ His evidence is that he made no attempt to mislead the Department, which seems to be corroborated by

² Hearing Book/Annexure 21.

³ *ibid*/Annexure 7.

⁴ *ibid*/Annexure 6.

contemporaneous documents.⁵ The Tribunal accepts this evidence. The applicant also states that Mr Willmot wrote several references for him and that templates were used that seem to have caused minor inaccuracies. The documents lend support to this evidence,⁶ leading the Tribunal to accept that no attempt to mislead the Department was made regarding the applicant's work experience. Accordingly, there is no evidence before the Tribunal that the applicant has given, or caused to be given, a 'bogus document', as defined in s.5(1) or that is 'information that is false or misleading in a material particular' as defined in PIC4020(5). The element of fraud or deception simply does not arise on the direct evidence before the Tribunal in this case. Therefore, the applicant meets PIC 4020(1).

Has a visa previously been refused based on a failure to satisfy PIC 4020(1)?

18. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
19. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1). Therefore, the Tribunal is satisfied that PIC 4020(2) is met.

Has the applicant satisfied the identity requirements?

20. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The Tribunal has viewed the relevant passports, birth certificates, police certificates, and marriage certificate on the departmental file. The question of identity is not live in this matter and, therefore, the Tribunal is satisfied that the applicant meets PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

21. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
22. There is no evidence before the Tribunal that the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A). Therefore, the Tribunal is satisfied that PIC 4020(2B) does not apply.
23. Based on the above, the applicant satisfies PIC 4020 for the purposes of cl.187.213. In view of this finding, the Tribunal notes that it is open to the department to reconsider its findings in relation to the other visa applicants.

DECISION

24. The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 187 - Regional Sponsored Migration Scheme visas:
 - Public Interest Criterion 4020 for the purposes of cl.187.213 of Schedule 2 to the Regulations.

⁵ibid/Annexure 7A.

⁶ibid/Annexures 12,13.

Andrew George
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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